IN THE

Supreme Court of the United States

October Term, 1969

No. 79

SANDRA ADICKES,

Petitioner,

against

S. H. KRESS AND COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT

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Opinions Below

On March 14, 1966, the United States District Court for the Southern District of New York, after the completion of full discovery, ordered summary judgment with respect to petitioner's claim that respondent S. H. Kress and Company (hereinafter "Kress") had entered into a conspiracy to deprive petitioner, the plaintiff below, of her civil rights, finding that there was

> "[N]o evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded person' might draw an inference of conspiracy."

The opinion (Honorable Dudley B. Bonsal, U. S. D. J.), reported at 252 F. Supp. 140 (S. D. N. Y. 1966), appears in the Appendix at A. 179.

On February 15, 1967, the United States District Court for the Southern District of New York (Honorable Charles H. Tenney, U. S. D. J.) entered an order and judgment

directing a verdict in favor of respondent on the ground that petitioner had failed to offer proof of a violation of the Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, 42 U. S. C. §1983 (hereinafter, "Section 1983") (A. 197).

On December 27, 1968, the United States Court of Appeals for the Second Circuit affirmed both decisions of the District Court, finding that

> (a) there had been no proof of a violation of Section 1983; and
>
> (b) the claim of conspiracy was unsupported by any facts tending "to suggest a conspiracy."

The opinion of the Court of Appeals, reported at 409 F. 2d 121 (2d Cir. 1968), appears at A. 201.

Jurisdiction

This Court granted *certiorari* on May 5, 1969, 394 U. S. 1011. Petitioner has invoked the jurisdiction of the Court under 28 U. S. C. §1254 (1) (Act of June 25, 1948, Ch. 646, 62 Stat. 928).

Questions Presented

1. Whether summary judgment dismissing a claim of conspiracy was proper where, after full discovery, petitioner produced no facts to support the alleged conspiracy and there was specific proof negating such a claim.

2. Whether the District Court correctly exercised its discretion in refusing to allow an amendment of the complaint to allege a claim under a statute, declared unconstitutional almost 90 years ago by this Court, where the statute had no applicability to the facts presented, irrespective of its constitutionality.

3. Whether in an action for damages, brought pursuant to 42 U. S. C. §1983 for failure to serve a person at a lunch counter, the courts below correctly ruled that there was no state action.*

4. Where witnesses were not previously specified in the pre-trial order, not identified until the day before trial, and their testimony was conceded by petitioner to be cumulative, did the District Court validly exercise its discretion in enforcing its Calendar Rules and precluding testimony of surprise witnesses.

The Court of Appeals unanimously affirmed the rulings of the District Court with respect to questions 1 and 4. The Appellate Court was divided, 2 to 1 (Waterman, J., dissenting), in affirming the trial court's order concerning question 3. The issue raised in question 2 was never presented to the Court of Appeals and it therefore was not ruled upon by that court. Accordingly, respondent submits that question 2 should not be considered by this Court.

Statutes and Rules Involved

The pertinent Statutes and Rules are:

Fourteenth Amendment to the Constitution

Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, 42 U. S. C. §1983;

Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335];

Rule 56, Federal Rules of Civil Procedure;

Rules 13 and 16, Calendar Rules of the United States District Court for the Southern District of New York.

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* The phrase "state action" is used by the courts and in this brief as the equivalent of, and interchangeable with, "under color of state law." See e.g., United States v. Classic, 313 U. S. 299 (1941).

Statement of the Case

1. The Original Complaint

This action, commenced by the filing of a complaint on November 12, 1964, sought damages in the amount of $550,000 from Kress for an alleged violation of Section 1983.

Briefly stated, the original complaint alleged, as a first cause of action, that on August 14, 1964, petitioner, a white person, accompanied six Negro students to the public library in Hattiesburg, Mississippi, where a request by the students to use the library facilities was refused and they were asked to leave. Petitioner and the students thereafter entered the local Kress store, where a waitress employed by Kress did not take petitioner's order while taking those of the Negro students.

The original complaint further charged, as a second claim, that after petitioner left the Kress store, she was arrested and jailed by officers of the Hattiesburg police department for vagrancy, pursuant to an alleged conspiracy between Kress and the Chief of Police of Hattiesburg.

2. Pre-Trial Proceedings

Following an answer in which respondent denied liability (A. 7-8), extensive pre-trial discovery was conducted. This included interrogatories submitted by both sides, the production of documents, and depositions of both petitioner and respondent's store manager (A. 9-118; 120-160). At the conclusion of this discovery, an uncontested note of issue was filed signifying that petitioner had completed all the discovery she deemed necessary to establish her case.

3. Summary Judgment

On November 29, 1965, respondent moved for summary judgment with respect to both claims of the original complaint.

(a) *The Conspiracy Claim*

Respondent, relying only on sworn testimony and affidavits,* submitted proof that the reason, and only reason, why petitioner was not served in the Kress store on August 14, 1964, was because of the imminent danger of violence. The store manager determined not to serve petitioner in order to avoid a riot and injury to her and her companions (A. 134, 136, 142, 150). This decision was shown to be totally unrelated to any alleged action by the State of Mississippi (A. 154-55). Respondent further submitted proof, in the form of sworn affidavits of members of the police force and of its Chief, as well as the testimony of respondent's store manager, to establish not only a total lack of conspiracy or even communication between respondent and the police, but, indeed, proof of animosity between them (A. 107, 110, 112, 154-155; 124-125). Respondent also relied upon petitioner's sworn statements that she had absolutely no knowledge of any connection or even communication between respondent and the police (A. 86; R. 717).

Petitioner offered no evidence to controvert this proof, but rather attempted to rely upon the mere sequence of events as alleged in the complaint and two unsworn, irrelevant statements (A. 177, 178).

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* While petitioner attempts to question the District Court's granting of summary judgment by claiming it was based on unsworn statements (Petitioner's Brief, pp. 2, 7, 22, 44), such an assertion is simply not true. The only unsworn statements submitted to Judge Bonsal were proffered by petitioner and not respondent and, indeed, respondent objected to them. Further, there is nothing to indicate that Judge Bonsal relied on them in reaching his decision.

The court, based on respondent's proof and the total lack of any contradictory evidence submitted by petitioner, granted respondent's motion for summary judgment with respect to the conspiracy, finding that respondent's motion could not be defeated "on the mere hope that [petitioner] will be able to discredit these denials by cross-examination at trial" (A. 183).

(b) *The Refusal to Serve Claim*

Kress asserted that petitioner had failed to demonstrate any state action related to the refusal to serve petitioner and hence that summary judgment was proper. In opposition, petitioner sought to satisfy the state action requirement by alleging that the existence of certain enactments of the Mississippi legislature established state action, without any showing that these enactments were in any way enforced.

Judge Bonsal found that all the Mississippi enactments cited by petitioner were irrelevant, save Section 2046[illegible]5 of the Mississippi Code. Nonetheless, the court denied this portion of respondent's motion, holding that if petitioner could show that defendant discriminated against her pursuant to a custom enforced by the state, she would have established a proper cause of action (A. 182).

4. Petitioner's Motion to Amend

After respondent had moved for summary judgment, petitioner filed a cross motion seeking to make certain amendments to the complaint. The only amendment respondent opposed was an effort to add a claim based on Sections 1 and 2 of the Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335], which had previously and repeatedly been declared unconstitutional by this Court.

The court rejected petitioner's attempt to introduce the unconstitutional Civil Rights Act of 1875 on the grounds

that, irrespective of constitutionality, on its face the Act did not apply to respondent (A. 183-184).

On March 29, 1966, petitioner served her First Amended Complaint, which included surplusage which Judge Bonsal had specifically ruled was irrelevant. Respondent moved to strike those portions of the complaint as prejudicial, which motion was granted, and on April 26, 1966, petitioner filed her Second Amended Complaint. In its Answer, respondent denied that petitioner had not been served because she was a white person in the company of Negroes (A. 188).

5. Pre-Trial Order

On December 9, 1965, more than a year and two months before trial, the District Court, acting pursuant to Rule 13 of its Calendar Rules, ordered the parties to exchange lists of witnesses and to file pre-trial memoranda setting forth "a list of witnesses which each party intends to call along with the specialties of experts to be called" (A. 119). In her pre-trial memorandum of June 28, 1966, petitioner designated herself and the six Negro students (A. 199).

On August 3, 1966, a pre-trial order was entered wherein petitioner agreed

> "[T]hat the witnesses whom each party now intends to call, along with the specialty of experts to be called, are those listed in the memorandum heretofore filed. . . . Should any party hereafter decide to call any additional witnesses, *prompt* notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum . . . shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum" (A. 195). (Emphasis the court's.)

The pre-trial order also stated and petitioner stipulated that

> "(4) Kress issued a policy statement, on or about July 15, 1964, expressly prohibiting the refusal of service in its stores to anyone because of race, color or national origin.
>
> "(5) The Kress Hattiesburg store maintained one set of eating facilities for its patrons since at least July 3, 1964. Prior to August 14, 1964, Kress had served Negroes at its luncheon counter in the Hattiesburg store.
>
> * * *
>
> "(8) The store contained 100 or more people, and people both inside and outside the store observed plaintiff and her group" (A. 191).

6. Exclusion of Surprise Witnesses

At a pre-trial conference held before the trial judge two weeks prior to trial, petitioner's counsel made no mention of any new witnesses. Nevertheless, on the very day before trial, petitioner served a paper entitled "Amendment to Pretrial Memorandum" which advised respondent for the first time of her intention to call an alleged expert witness to testify with respect to custom. The identity of a second proposed expert witness was not even contained in that Amendment, but was mentioned in passing in petitioner's trial memorandum served the same day (A. 227). In neither instance did petitioner comply with the District Court's requirement of stating the reason why the witness was not previously designated. Thus, despite two orders, entered fourteen months and six months before trial respectively, which required petitioner to give prompt notice of the identity of any witnesses, she did not do so until less than twenty-four hours before trial.

Petitioner's counsel admitted to the trial judge that her failure to inform respondent of the witnesses sooner

was due to the fact that she had taken absolutely no steps to secure any expert witnesses until after the final pretrial conference (A. 229). Indeed, petitioner's counsel confessed that she had never met the proposed witnesses and did not know what their testimony would be (A. 295). Counsel stated that a postponement of the case would not have aided her since "on the date the case could be put over I could well not have had" the witnesses (A. 233). Finally, petitioner's counsel admitted that the witnesses would not have testified to anything more than what was already in the record (A. 293).

7. Trial Proceedings

The case was tried before the Honorable Charles H. Tenney and a jury commencing on February 14, 1967. The trial court, when apprised of the facts surrounding petitioner's attempt to introduce two surprise witnesses at the eleventh, or, indeed, twelfth hour, ruled that to allow these witnesses to testify would be highly prejudicial to respondent. Petitioner did not request an adjournment of the trial, since her counsel admitted that she could not know whether the witnesses would be available at a later time (A. 233).

Petitioner and three of the students who accompanied her testified. Petitioner related the facts of her presence in Mississippi, her teaching, the decision to attempt to integrate the library, and of the trip to Hattiesburg on August 14, 1964. She stated that all of the participants had decided to wear identical clothing, work blouses and skirts (A. 261), and admitted that the attempt to integrate the library was directly contrary to the instructions she had received from her superiors, since there was fear of violence. She further admitted that she was aware of instances of violence in Hattiesburg (A. 260-61).

Following the unsuccessful attempt to integrate the library, petitioner and her group, dressed alike and walking

in twos and threes, went approximately six blocks down the main street of the city to the Kress store, with a stop at the Woolworth store. The petitioner admitted that the group went to Kress because they knew that Kress served Negroes at its facilities. The decision to go to Kress was made at the last moment, and the group had no previous intention to do so (A. 261). Petitioner conceded that while walking down the street she observed "quite a number" of police around and 2 or 3 police cars (A. 263).

Petitioner entered Kress' store, which she agreed contained about 100 people (A. 191, 264). Petitioner noted that people in the aisle were staring at the group and that people outside were looking through the front windows at the group (A. 76). In this atmosphere, respondent's store manager instructed the waitress not to serve Miss Adickes, despite the fact, as previously noted, that Kress was known to be one of the stores in Hattiesburg which served both Negroes and whites in its store (A. 260).

The testimony of the three students was substantially the same, noting that Kress had a single set of eating facilities at which all were served and for which it had received nationwide publicity (A. 275-76, 282).

Respondent moved for a directed verdict at the close of petitioner's case. The trial judge ruled that petitioner had not established any relevant custom and usage (A. 321). The court went on to hold, however, that even assuming for the purpose of the motion that there was proof of such a custom or usage, plaintiff had failed to offer any proof in the record which showed that the custom or usage was enforced by the state. In short, there was absolutely no state action, and since this is the *sine qua non* for a claim under 42 U. S. C. §1983, the court directed a verdict in respondent's favor (A. 321-22).

Summary of Argument

After extensive discovery and upon a full hearing, the Honorable Dudley B. Bonsal, U. S. D. J., correctly granted summary judgment dismissing petitioner's unsupported and frivolous conspiracy claim. The court acted in view of the clear and convincing proof offered by respondent that there was no conspiracy and the total absence of any evidence by petitioner to the contrary. The Circuit Court was unanimous in its affirmance.

It is submitted that the District Court properly denied petitioner leave to amend her complaint to add a purported claim under the Civil Rights Act of 1875. While respondent contends that the question is not properly before this Court, since it was not raised in the Court of Appeals, it is clear on the face of the statute that the Act does not apply here. In addition, the Act has been declared unconstitutional, and as such is void.

The foundation for petitioner's remaining claim has been Section 1983—the "state action" statute. However, from the very outset, petitioner has failed to adduce any evidence whatsoever of the requisite state involvement in Kress' action, which is the touchstone under the Fourteenth Amendment to the Constitution. She relied solely on the *pro forma* existence of a forgotten and completely unenforced Mississippi statute, which merely restates the common law right of a restaurant owner to select his customers as he pleases. Nevertheless, Judge Bonsal, giving petitioner the greatest possible latitude, took a broad view of her case and ruled that she could recover under Section 1983 if she could show that respondent discriminated against her pursuant to a custom enforced by the state under the Mississippi statute (A. 182).

At trial, petitioner failed to prove the existence of a relevant custom which was enforced by the State of Missis-

sippi or that the state was in any other way involved, directly or indirectly, in the mere refusal of service by Kress. Accordingly, the trial court directed a verdict for respondent at the close of petitioner's case.

Respondent contends that the District Court was correct in holding that petitioner failed to make a *prima facie* showing of state action. The Mississippi statute, Section 2046.5, is on its face, a neutral enactment, which has never been enforced. In addition, petitioner did not in any way establish that respondent had acted pursuant to that statute. In short, Kress can in no way be said to have acted under color of any discriminatory statute or custom of the State of Mississippi. There simply was no rational nexus between state authority or power and Kress' private act so as to render Kress liable for money damages under Section 1983.

While petitioner might have sought injunctive relief under the Civil Rights Act of 1964, 42 U. S. C. §2000a *et seq.*, without having to prove state action, petitioner chose instead to seek more than half a million dollars in monetary damages under Section 1983, which requires state action. Petitioner should not be permitted to extrapolate from both statutes so as to receive large money damages without satisfying the basic state action requisite of Section 1983.

Finally, the District Court acted wisely, correctly, and certainly within its proper discretion, in excluding petitioner's two surprise witnesses, whose testimony would have been merely cumulative and of no probative value.

ARGUMENT

POINT I

Summary judgment was correctly granted where there was no proof of conspiracy.

The gravamen of the second claim in the original complaint was the charge that there was a conspiracy between Kress and the Chief of Police of Hattiesburg to have petitioner refused service in Kress' store and later to be arrested by the police. These allegations are, it is submitted, pure fantasy. Even after the completion of extensive discovery and the filing of an uncontested note of issue signifying that petitioner had assembled all of the facts she deemed necessary to establish her case, petitioner failed to produce a shred of evidence to support that charge. Petitioner having failed to prove a *prima facie* case, the courts below unanimously held that Kress was entitled to summary judgment on this issue. See *Scolnick* v. *Lefkowitz*, 329 F. 2d 716 (2d Cir.), *cert. denied*, 379 U. S. 825 (1964).

A. The Facts

The conspiracy alleged was claimed to have involved three specific acts:

> (1) the refusal of the librarian to let the Negro students use the library;
>
> (2) the arrest of petitioner by the police on the streets of Hattiesburg on a charge of vagrancy; and
>
> (3) the refusal of Kress to serve petitioner.

Each of these events and the evidence relating to them will be dealt with separately to make it clear that not only

was there no proof of a conspiracy in the record but that the uncontested facts actually established that no conspiracy existed. There was not a scintilla of evidence which could properly have been sent to a jury and since the court would have been required to direct a verdict for respondent at the close of petitioner's case, summary judgment was proper. *Morgan* v. *Sylvester*, 125 F. Supp. 380 (S. D. N. Y. 1954), *aff'd*, 220 F. 2d 758 (2d Cir.), *cert. denied*, 350 U. S. 867 (1955).

1. *The Library*

This is probably the most far-fetched charge of the three made by the petitioner in the courts below. To claim, in view of the record, that the incident at the library was connected with any "conspiracy" is preposterous.

Petitioner and the six Negro students planned, prior to August 14th, to integrate the Hattiesburg public library (A. 65-67). There was no claim that anyone in Kress knew this at any time prior to the day in question and the evidence demonstrated the contrary (A. 86; 154). The group arrived at the library and the Negroes sought the use of the facilities, which was denied by a librarian whose name is known to neither petitioner nor Kress. The librarian requested that the group leave and the students refused. The librarian thereupon called the Chief of Police who, on arrival, ordered the library closed (A. 68-70).

The evidence was clear and uncontradicted that Kress had no connection with, or knowledge of, any of the events at the library. The testimony of Mr. Gordon T. Powell, Kress' store manager, was emphatic in this regard,* and

* "Q. Mr. Powell, did you ever discuss Miss Adickes, or anyone in her group, with anyone employe[d] at the Hattiesburg public library? A. No.

Q. Do you even know anyone employed at the Hattiesburg public library? A. No.

(footnote continued on next page)

made incontestable by the deposition testimony of Miss Adickes.**

The complete absence of any evidence to support petitioner's charge was further documented by her answers to interrogatories propounded by Kress wherein petitioner was asked to state the name of each employee of Kress claimed to have caused the refusal at the library and the manner in which the refusal was caused. After a series of nonresponsive answers, Kress finally obtained the following statements, which petitioner has never changed or supplemented:

> "Plaintiff claims that an officer, director of [sic] employee of Kress refused, cooperated or caused

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(footnote continued from previous page)

Q. Did you know, as of the time Miss Adickes came into your store on August 14th that she, or anyone else had been to the Hattiesburg library at any time to integrate the facilities? A. No.

* * *

Q. Did you agree with any public official in Hattiesburg, or the state of Mississippi, to deny Miss Adickes or anyone in her group the use of the Hattiesburg public library facilities? A. No." [A. 154-55]

** "Q. Miss Adickes, do you have any knowledge of any communication between Kress or any of its officers or directors or employees, with anyone connected in any way with the Hattiesburg Public Library? A. No, I have no knowledge, no direct knowledge.

Q. No what? A. No direct knowledge.

Q. Do you have any knowledge? A. No.

Q. During the entire course of time that you were in or about the Hattiesburg Public Library, did anyone say anything about or mention the names of Kress or any of its officers or employees? A. No.

* * *

Q. Do you have any knowledge of any communication between Kress or any of its officers, directors or employees, with any public official of the City of Hattiesburg? A. No.

Q. Or of the State of Mississippi? A. No.

* * *

Q. Do you have any knowledge at the time you went to the Kress Store on August 14, 1964, that any employee of Kress was even aware of the alleged events at the library? A. No." [A. 86]

in some manner, the details of which are unknown to her, the refusal of library facilities to plaintiff and her companions.

* * *

"*Plaintiff has no knowledge* at this time of the names of any such officer, director or employee *nor does she presently have any knowledge* as to the manner in which said refusal was caused." (Emphasis supplied.) (A. 115)

The sum total of this evidence was the uncontroverted fact that Kress was not even aware of the happenings at the library, much less did it discuss the events with anyone at the library or the police; certainly it was not a party to a "conspiracy." Indeed, petitioner confessed a total absence of any information, be it even hearsay or rumor, concerning any "conspiracy" relating to the library. The record was clear that not only did petitioner adduce no evidence to support her claim, but the uncontroverted evidence showed that there was no "conspiracy" relating to the library. In such circumstances, the claim was patently sham and should not have been permitted to stand.

2. *The Arrest*

Petitioner further claimed that she was arrested pursuant to this illusory conspiracy. Here too, she failed to produce any facts to support the allegations and the record belies such an assertion.

Kress asked petitioner, in interrogatories, to state the manner in which she claimed Kress caused her arrest and the name of the person or persons who so acted. After much travail, petitioner finally admitted that:

"*Plaintiff has no knowledge as to the manner in which Kress caused plaintiff's arrest. Plaintiff has*

> *no knowledge at this time of the name, address or occupation of the person who caused the arrest,* except that, upon information and belief, such person was employed by or acted on behalf of Kress." (Emphasis supplied.) (R. 717)

This was further enforced by petitioner's own deposition testimony admitting that she had no knowledge supporting the claim that Kress conspired with the police:

> "Q. Do you have any knowledge of any communication between Kress or its officers, directors or employees, with any member of the Hattiesburg Police Department or any officer of the police department? A. No.
>
> • • • •
>
> "Q. Did any officer, director or employee of Kress make any statement to you or anyone else to your knowledge which in any way mentioned the Hattiesburg Public Library or the Hattiesburg Police Department? A. No.
>
> • • •
>
> "Q. Did any member of the Hattiesburg Police Department or any other public official of Hattiesburg make any statement to you or anyone else, to your knowledge, which in any way related to Kress or any of its officers, directors or employees? A. No" (A. 86).*

In sum, petitioner conceded a total absence of any evidence of a conspiracy between Kress and the police. Petitioner alleged that the arrest was conspiratorial but came

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* This is, of course, contrary to the wholly unsupported charge (Petitioner's Brief, p. 4) that petitioner was arrested because of her request for service. There is not a shred of proof that would lead to this unwarranted conclusion.

forth with not an iota of proof to support such a charge. Not only did petitioner admit that she had no facts, but her own testimony negated any possible trace of an inference. Petitioner testified that upon leaving the library and while going to Woolworth's, before she even decided to go to Kress——

> "I had been aware of police around us from the moment we left the library."
>
> • • •
>
> "A. I am not saying the car followed us [the Chief of Police's car] but we were aware of the presence of police.
>
> "Q. You saw policemen about? A. Yes, yes.
>
> "Q. Did you see any in the Woolworth Store? A. I think there was one right outside.
>
> "Q. Did you see the particular police car, the chief of police's car again? A. No.
>
> "Q. Or any police car? A. I saw police cars, yes.
>
> "Q. In front of Woolworth's or about Woolworth's? A. Nearby, yes, I remember they were nearby.
>
> "Q. Approximately how many police would you say you saw about in the Woolworth's vicinity? A. When I was in the store I have a recollection of seeing one outside the store.
>
> • • •
>
> "Q. As you left the Woolworth store did you notice a police car? A. Yes, there were police, quite a number of them all around.
>
> "Q. All around the Woolworth store? A. Yes. There weren't a lot of cars, but there were a lot of policemen around" (A. 72).

Thus, the police had been about Woolworth's and in the streets before petitioner went to Kress. In light of this, it is not surprising that petitioner could not produce any proof that Kress had called the police or had anything to

do with her arrest; the simple fact is that it didn't. At the deposition of Mr. Powell, the Kress store manager, where petitioner had full opportunity to cross-examine, it was conclusively established that there was not even the slightest thread of connection between the Hattiesburg Police and defendant. It is hard to imagine a more searching examination with more negative results for the petitioner.*

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* "Q. Did any police official call on August 14th or 15th, 1964, concerning Miss Adickes? A. No.

"Q. Did you call any police official during the month of August 1964 regarding Miss Adickes? A. No.

* * *

"Q. When did you first become aware that Miss Adickes had been arrested? A. That afternoon or evening, when I arrived home and looked into the Hattiesburg American, the local newspaper. It had a story in there about the library incident, and, from reading this, I found out she had been arrested. (A. 148)

* * *

"Q. Did you on August 14th, or any time prior thereto, have any discussions with any member of the Hattiesburg police department concerning Miss Adickes? A. No.

"Q. Or concerning any Civil Rights worker? A. No.

"Q. Did you have any discussion on August 14, 1964, or at any time prior thereto, with any member of the Hattiesburg Police Department concerning the Kress policy of serving both negroes and whites? A. No.

* * *

"Q. Did you have any conversation with anyone on or before August 14th relating to the arrest of Miss Adickes? A. No.

"Q. Did you or anyone else in Kress, to your knowledge, request that the police come to this Kress store on August 14th? A. No.

"Q. Did you, or anyone else, to your knowledge, in Kress, ask the police to arrest Miss Adickes? A. No.

"Q. Did you know that the police were coming to arrest Miss Adickes on August 14th? A. No, I did not.

* * *

"Q. Did you agree with anyone in Hattiesburg, any public official or State official, to have Miss Adickes arrested on August 14, 1964? A. No, I did not.

"Q. Did you agree with any Hattiesburg official or State official to refuse service to Miss Adickes on August 14, 1964? A. No." (A. 154-55)

Furthermore, the affidavits of the police officers who arrested petitioner made it clear that the arrest was not pursuant to any conspiracy with Kress, but was rather due to the independent action of the officers. The officers swore that

> "[t]his arrest was made on the public streets of Hattiesburg, Mississippi, and was an officer's discretion arrest. I had not consulted with Mr. G. T. Powell, Manager of S. H. Kress and Company in Hattiesburg, and did not know his name until this date. No one at the Kress store asked that the arrest be made and I did not consult with anyone prior to the arrest" (A. 110, 112).

The Chief of Police corroborated this, stating that "Mr. Powell had made no request to me to arrest [Miss] Sandra Adickes or any other person . . . Mr. Powell and I had not discussed the arrest of this person until the day of this statement and we had never previously discussed her in any way" (A. 107). The uncontradicted proof is, therefore, that whatever reasons the police had for the arrest, it was never, in any way, discussed with, requested by or even known to Kress.

The affidavits offered by respondent were never rebutted. Petitioner made no attempt to do so, and even now does not claim that there were any additional available facts. *Cf. Robin Construction Co.* v. *United States*, 345 F. 2d 610, 613-14 (3rd Cir. 1965); *Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831 (2d Cir. 1958). Instead, petitioner complains, "respondent should not have been permitted to rely upon the *ex parte* affidavits of the police officers and the Chief of Police. . . ." (Petitioner's Brief, p. 45). This ignores the fact that affidavits are perfectly proper under Rule 56 and that once a party moving for summary judgment comes forth with a sufficient showing of uncontested facts, the burden shifts to the opposing party to establish, by proper means, a genuine

material issue for trial. *Scolnick* v. *Lefkowitz*, 329 F. 2d 716 (2d Cir.), *cert. denied*, 379 U. S. 825 (1964).

Petitioner decided not to do this, but rather to rely upon the mere allegations of the original complaint (Petitioner's Brief, p. 45).* Having made this choice, petitioner now seeks to avoid the consequences. The District Court granted summary judgment not merely, as petitioner suggests, upon the facts shown by Kress, but upon the total absence of any proof to the contrary. While perhaps a plaintiff can file a complaint based on nothing more than conjecture or suspicion, when faced with a summary judgment motion, after full discovery, plaintiff must produce some facts and cannot continue to rely on mere "hunches." *Waldron* v. *Cities Service Co.*, 361 F. 2d 671 (2d Cir. 1966), *aff'd sub nom. First Nat. Bank* v. *Cities Service Co.*, 391 U. S. 253 (1968). Thus, the simple expedient of alleging "conspiracy" cannot forestall judgment indefinitely. Where a plaintiff simply has no proof, such as here, summary judgment is required. See, *Doff* v. *Brunswick Corp.*, 372 F. 2d 801 (9th Cir. 1966), *cert. denied*, 389 U. S. 820 (1967).

3. *The Refusal of Service*

While Kress does not deny that petitioner was refused service, it does strongly deny that such refusal was "con-

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* Petitioner now claims that a conspiracy "can, without more, be inferred from the sequence of events" (Petitioner's Brief, p. 45). In this connection petitioner points to the fact that a policeman entered Kress while she was present. However, as petitioner knows, this is a slender reed upon which to rely. Petitioner's sworn testimony states that from the moment she left the library the police followed her (A. 72-73). Further, even according to the testimony of petitioner's own witnesses (which petitioner never tendered on the summary judgment motion), the policeman did nothing but look at the group, walk to the back and leave (A. 302-03). Since the proof is clear that Kress did not know of the library incident or call the police, to fabricate a case upon the entry of a police officer into the Kress store is fantastic.

spiratorial" or was based upon race, color or creed. Indeed, Kress was a leader in civil rights in the South and had made certain that its facilities were available to all (A. 104-06; 275-76). In fact, it was for just this reason that petitioner and the students came to Kress (A. 260).

Mr. Powell candidly testified that the only reason he refused Miss Adickes service was because "of the very explosive atmosphere that was in the store at that time" (A. 142). He said:

> " . . . . quickly I just made up my mind to avoid the riot, and protect the people that were in the store, and my employees, as far as the people in the mob who were going to get hurt themselves. I just knew that something was going to break loose there" (A. 134).

Indeed, the deposition of Mr. Powell is replete with statements showing that his was a unilateral refusal to serve Miss Adickes, triggered solely by his fear for her safety and that of her companions and the other customers in the store (A. 136). It was completely unconnected, in any way, with the Chief of Police of Hattiesburg, or, indeed, any other official (A. 154-55).

The statements of the police officers who arrested Miss Adickes and of the Chief of Police confirm this, stating that they "did not even know" Mr. Powell until three months after the incidents alleged. Under these circumstances, it is clear that the police had nothing to do with, were not consulted by, and weren't even aware of Mr. Powell's decision not to serve Miss Adickes.

To controvert this, petitioner failed to come forward with even a fragment of proof to show a conspiracy be-

tween Kress and anyone.* The two lower courts properly refused to permit petitioner's vague unsupported allegations to serve as a substitute for the hard facts which Kress assembled, particularly since petitioner admitted that she had absolutely no knowledge of any communications between Kress and the police of Hattiesburg.

> "Q. Do you have any knowledge of any communication between Kress or its officers, directors or employees, with any member of the Hattiesburg Police Department or an officer of the police department? A. No" (A. 86).

Here too, it is beyond doubt that petitioner's claims were totally unsubstantiated and called for the granting of summary judgment. *Waldron* v. *British Petroleum Co.*, 38 F. R. D. 170 (S. D. N. Y. 1965), *aff'd sub nom. Waldron* v. *Cities Service Co.*, 361 F. 2d 671 (2d Cir. 1966), *aff'd sub nom. First Nat. Bank* v. *Cities Service Co.*, 391 U. S. 253 (1968).

B. The Law

The issue is whether, based upon the record, petitioner can be said to have shown the existence of any genuine issue of material fact which was sufficient to defeat the motion for summary judgment. *Schwartz* v. *Musicians*

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* Petitioner strains to create an issue through her repeated assertions that respondent offered unsworn statements in support of the motion (Petitioner's Brief, pp. 2, 7, 22, 44). Actually, it was petitioner who offered these statements, and respondent objected to their use.

In any event, the statements are irrelevant. Even petitioner, who relies on the statements, does not argue that they were probative with respect to the claimed conspiracy, but only that they "did not corroborate" Kress' position (Petitioner's Brief, p. 44). Any attempt to create an issue out of these statements is specious, since they are innocuous on their face, and such unsworn statements are totally improper and inadmissible on a motion for summary judgment. *Cf. Mahoney* v. *McDonald*, 38 F. R. D. 161 (E. D. Pa. 1965).

Local 802, 340 F. 2d 228, 232 (2d Cir. 1964). While Kress had the initial burden of proving sufficient uncontested facts demonstrating that summary judgment was appropriate, once Kress satisfied its burden, petitioner was obliged to set forth specific facts, establishing that there was a genuine material issue for trial. *Scolnick* v. *Lefkowitz,* 329 F. 2d 716 (2d Cir.), *cert. denied,* 379 U. S. 825 (1964); *Rowe* v. *Harris,* 195 F. Supp. 310 (W. D. Ark. 1961).

The fact that petitioner saw fit to call this a "conspiracy case" cannot save her from the granting of a motion for summary judgment. Although it is true that the complaint and the allegations thereunder were to be construed liberally, *Morgan* v. *Sylvester,* 125 F. Supp. 380 (S. D. N. Y. 1954), *aff'd,* 220 F. 2d 758 (2d Cir.), *cert. denied,* 350 U. S. 867 (1955), that in itself is not enough to evade a motion for summary judgment. For while it is easy for a disgruntled plaintiff to state a conclusion, and even believe that those responsible for a real or imagined injustice were guilty of the rankest kind of malice, he cannot go to trial in any case, even a Civil Rights Act case, solely on the basis of speculative beliefs and the unreasonable inferences sought to be drawn from the record. *Pugliano* v. *Staziak,* 231 F. Supp. 347 (W. D. Pa. 1964), *aff'd,* 345 F. 2d 797 (3rd Cir. 1965).

> "'To defeat a movant who has otherwise sustained his burden within the principles enunciated above, the party opposing the motion must present facts in proper form—conclusions of law will not suffice; and the opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, nor merely suspicions.' 6 Moore, Federal Practice (2d ed., 1953) ¶56.15[3], p. 2131." *Boyce* v. *Merchants Fire Insurance Co.,* 204 F.

Supp. 311, 313 (D. Conn.), *aff'd*, 308 F. 2d 806 (2d Cir. 1962).

Nor can petitioner continue to try to hide behind the claim that conspiracies are difficult to prove. Such a claim ignores the fact that extensive pre-trial proceedings were held and that petitioner could still offer no evidence of a fact from which a reasonably-minded person could draw an inference of conspiracy. *Waldron* v. *Cities Service Co., supra; Morgan* v. *Sylvester, supra.* Further, summary judgment will not be denied on the mere hope that something will turn up on trial to enable a party to discredit, in some way, the movant's evidence. *Dyer* v. *MacDougall,* 201 F. 2d 265 (2d Cir. 1952); *Holdeen* v. *United States,* 186 F. Supp. 76 (S. D. N. Y. 1960).

Thus, the District Court was correct when it found

> "no evidence in the complaint or in the affidavits or other papers from which a 'reasonably-minded person' might draw an inference of conspiracy. . . . The plaintiff may not defeat defendant's motion for summary judgment on the mere hope that she will be able to discredit these denials by cross-examination at trial" (A. 182-83).

All three of the judges in the Court of Appeals voted to affirm the trial court on this issue, bluntly concluding that

> "Plaintiff's claim was wholly conclusory; she alleged no facts that would tend to suggest a conspiracy; and the chances of her proving such a conspiracy at the trial were nil" (A. 210).

POINT II

The Civil Rights Act of 1875 is inapplicable to this action.

More than a year after the filing of the complaint, and only after respondent had moved for summary judgment, petitioner sought to amend the complaint to add a claim under Sections 1 and 2 of the Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335]. Petitioner's counsel conceded that such an amendment was based upon "a very way-out theory" (A. 298), since that statute had previously been declared unconstitutional. The District Judge, exercising his discretion under Rule 15 of the Federal Rule of Civil Procedure, denied the motion (A. 183-84). Petitioner never raised the issue again and failed to claim any error before the Court of Appeals. Accordingly, that court did not rule on this specific contention and the only holding is that of Judge Bonsal.

Where, as here, an issue was not raised in the Court of Appeals, this Court will not review the question, unless it is a most exceptional case. *Lawn* v. *United States*, 355 U. S. 339, 362-631, n. 16 (1958); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927); *Husty* v. *United States*, 282 U. S. 694, 701, 702 (1931). Since there are no exceptional circumstances here, petitioner's claim is not properly before this Court for decision, and should not be considered.

While petitioner has tried to induce this Court to consider the theory that Sections 1 and 2 of the Act can be reenacted by judicial action, that issue need not be decided because the Act has no application here in any event. Section 1 of the 1875 Act grants

> ". . . full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns,

> public conveyances on land or water, theaters, and other places of public amusement. . . .

Section 2 provides not only for a civil action by any person aggrieved under the law to recover $500.00 in damages, but also for criminal penalties in the form of fines and incarceration for a period of up to a year.

The Act does not apply to the instant case because, as the District Court held, not even the broadest interpretation of "inns" as used in the 1875 Act could encompass respondent's lunch counter (A. 183-84). See also *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 n. 1 (4th Cir. 1959) and Nimmer, "A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875", 65 Col. L. Rev. 1394 at pp. 1396-1397 (1965) and cases cited. As petitioner's brief clearly points out (pp. 41-42), the word "inn" refers to a public house which offers *lodging* and accommodations for *travellers*. See also discussion, pp. 34-36, *infra*, and Virginia Commission on Constitutional Government, The Reconstruction Amendments Debates, at 711, 720, 727, 738 (1967). The Civil Rights Act of 1964 sets forth the distinction between "inns" and restaurants or lunch counters as follows:

> "(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests. . . .
>
> "(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station. . . ." 42 U. S. C. §2000a.

Though both of these categories are subject to liability under the 1964 Act,* the Act draws a clear distinction between inns, which are mentioned in the 1875 statute, and restaurants and lunch counters, which are not covered.

Since it is clear from the language of the statute that it would not apply to Kress' lunch counter, the District Court was correct in ruling that there was no need to decide the question of the constitutionality of the 1875 Act (A. 185). When this is coupled with petitioner's abandonment of this issue in the Court of Appeals, the point becomes nugatory. Under these circumstances this Court has traditionally refrained from deciding constitutional questions, *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346 (concurring opinion, Brandeis, J.) (1936).

However, if the Court is nonetheless to consider petitioner's theory, the claim is still without merit. Shortly after its enactment, the 1875 statute was declared unconstitutional by this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883). In 1913, this Court again adjudged the statute to be altogether invalid in *Butts* v. *Merchants & Miners Transportation Co.*, 230 U. S. 126 (1913).

Despite these clear holdings, petitioner nevertheless attempts to conjure up authority for the proposition that the statute has somehow been revived by this Court's decisions in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) and *Katzenbach* v. *McClung*, 379 U. S. 294 (1964), which, of course, did not relate to this statute,

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* The Civil Rights Act of 1964 clearly extends to much more inclusive categories of public places than the 1875 Act and provides for sweeping injunctive relief against discriminatory treatment in any such places. The 1875 Act, on the other hand, merely enables a private party to bring a civil suit to recover $500.00. Under these circumstances, it is not surprising that Congress has not attempted to reenact the old 1875 statute with its narrower application.

but to Title II of the Civil Rights Act of 1964 (42 U. S. C. §2000a *et seq*). See, Nimmer, *supra.*

Two different Circuit Courts of Appeals have been asked to rule on the theory, now advanced by petitioner, that the 1875 statute can somehow be revalidated. Both courts found the theory to be specious. The Fourth Circuit refused to entertain a claim based on the 1875 statute where a privately-owned restaurant had refused to serve a person because of his race, *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845 (4th Cir. 1959). Likewise, when the District of Columbia Circuit considered this long moribund statute, it concluded that "Sections 1 and 2 of the Civil Rights Act of 1875 have no present validity." *Williams* v. *Hot Shoppes, Inc.,* 293 F. 2d 835, 837 (D. C. Cir. 1961), *cert denied,* 370 U. S. 925 (1962).

Though the statute has not been expressly repealed by Congress, it does not appear in the United States Code, and certainly the unqualified and definite holdings of the statute's unconstitutionality by this Court and by lower federal courts have effectively removed it from operative law. An unconstitutional statute, though having the form and name of law, is in reality no law, and is wholly void and ineffective. *Marbury* v. *Madison,* 5 U. S. (1 Cranch) 137 (1803). Since unconstitutionality dates from the time of enactment, and not merely from the date of the decision branding it unconstitutional, an unconstitutional act is as inoperative as if it had never been passed. As this Court stated in *Chicago, Ind. & L. Ry. Co.* v. *Hackett,* 228 U. S. 559, 566 (1913), a statute which has been declared unconstitutional is

> "'as inoperative as if it had never passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing law. *Norton* v. *Shelby County,* 118 U. S. 425, 442; *Ex parte Siebold,* 100 U. S. 371, 376."

Petitioner's theory flaunts the very genesis of constitutional jurisprudence. There has never been any doubt that legislation under the constitution is either valid or it is void and no amount of semantics can change that. See, *Marbury* v. *Madison, supra.* Without regard as to whether the Congress could validly reenact the 1875 statute, the simple fact is it has not done so. In 1964 the Congress passed a new Civil Rights Act ignoring the old 1875 statute. This Court has acknowledged that it does not exercise revisionary power over the acts of Congress, *Muskrat* v. *United States,* 219 U. S. 346 (1911), and respondent respectfully urges that this Court should not now legislate where the Congress has declined to do so.

POINT III

The District Court was correct in holding that petitioner did not meet the state action requirement of 42 U. S. C. §1983.

In this action, where petitioner claims a denial of her civil rights because of a refusal of service, the indispensable element for damages under 42 U. S. C. §1983 is that the defendant act "under color of any statute, ordinance, regulation, custom, or usage" of the state. Section 1983 is a Reconstruction Era statute based upon the Fourteenth Amendment, which, of course, specifically and repeatedly limits itself to actions of the state. Thus, Section 1983 does not grant a cause of action for injury resulting from mere private actions * but rather requires proof of

* It was this gap in the application to individuals which led Congress to pass the Civil Rights Act of 1964, 42 U. S. C. §2000a *et seq.* See *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241 (1964). Here, however, petitioner has not sought the relief of that statute, but rather damages in excess of half a million dollars.

the existence of some "state action." See *e. g. Monroe* v. *Pape,* 365 U. S. 167 (1961). This requirement was recognized as early as the *Civil Rights Cases,* 109 U. S. 3, 17 (1883):

> "[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual. . . ."

To establish state action under Section 1983, petitioner must show that "to some significant extent the State in any of its manifestations has been found to have become involved" in respondent's alleged discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722 (1961). There must have been some implementation of the private discrimination by the state's use of its legal powers, *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), the crucial test being whether state power "has in fact been exercised." *New York Times* v. *Sullivan,* 376 U. S. 254, 265 (1964). As was more recently stated in *Elders* v. *Consolidated Freightways Corp.,* 289 F. Supp. 630, 633-34 (D. Minn. 1968):

> "In order for an act to be done under color of state law it is necessary that there be 'a vesting of *actual* authority of some kind,' in the actor. . . . It is not enough that the defendant exercises some power possessed only by virtue of his private citizenship. . . . Rather the acts must be such as are a manifestation or an alloy of the power of the state, and possible only because the defendant has been somehow dressed with that power. To some extent the state itself must be involved, or the

alleged wrongdoer must be acting under its authority or wielding a power of the sort commonly attached to the state." [Emphasis the court's]

See also, *United States* v. *Classic*, 313 U. S. 299, 326 (1941). Only by "sifting facts and weighing circumstances" of the particular case can a court make a determination as to the existence or nonexistence of state action. *Burton* v. *Wilmington Parking Authority, supra* at 722.

A. Respondent's Refusal of Service Was Not Under Color of State Law

Petitioner first attempts to prove the requisite state involvement by relying on three Mississippi statutes and a legislative resolution. The Court of Appeals affirmed the District Court's decision that two of these statutes and the resolution were not only totally irrelevant to the instant case, but were highly prejudicial as well, and should have been stricken from the complaint (A. 185).* Such a ruling was well within the court's discretion and should now be affirmed. See, *e.g.*, *Paul M. Harrod Co.* v.

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* The Court of Appeals stated:

> "It is true that in 1956 the Mississippi legislature passed, . . . Mississippi State Senate Concurrent Resolution No. 125 condemning and protesting the Supreme Court's school integration cases (*Brown* v. *Board of Education*, 347 U. S. 483 (1954), 349 U. S. 294 (1955)), and a resolution, found in Miss. Code §4065.3, directing the entire executive branch of government and all persons responsible thereto, including the police, to give effect to the Senate Concurrent Resolution, described as the 'Resolution of Interposition.' See also Miss. Code §2056(7), a broad conspiracy statute passed in 1954 which, *inter alia*, makes it a crime to overthrow or violate the segregation laws of the state. However, these 1956 enactments are clearly insufficient by themselves to prove that in 1964 Mississippi had a custom of separating the races in restaurants. *Williams* v. *Howard Johnson's Inc.*, 323 F. 2d 102, 106 (4th Cir. 1963); Comment, 50 Cornell L. Q. 473, 494 (1965)" (A. 206).

A. B. Dick Co., 194 F. Supp. 502 (N. D. Ohio, 1961); *Moore* v. *Prudential Ins. Co. of America*, 166 F. Supp. 215 (M. D. N. C. 1958); see also, *Renshaw* v. *Renshaw*, 153 F. 2d 310 (D. C. Cir. 1946).

Faced with the obvious inapplicability of these enactments to this case, petitioner has fabricated the argument that their mere existence constitutes a basis for monetary damages against Kress, whether it knew of or relied upon these enactments or not. Petitioner has cited no authority, and there is none, to support such a novel proposition. This lack of authority is not surprising since the theory is in contravention of any basic concept of fair play, as it would automatically make Kress liable for acts in which it did not participate and had no say.

Moreover, petitioner's assertion flies in the face of the plain language of Section 1983 which requires that in order to be liable, a person must have acted "*under* color of" law. These key words, the language of the Fourteenth Amendment itself, and the cases for almost one hundred years make it clear that the basic prerequisites for liability under this section are knowledge of, and action taken pursuant to, state law:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States* v. *Classic*, 313 U. S. 299, 326 (1941).

The third statute relied upon by petitioner, Section 2046.5 of the Mississippi Code (A. 173-74), provides that a business, including a restaurant, may

> "choose or select the person or persons he or it desires to do business with, and . . . refuse to sell to, wait upon or serve any person that the owner, manager, or employee of such public place

of business does not desire to sell to, wait upon or serve. . . ."

The statute also provides that anyone who is requested to leave but refuses to do so is guilty of trespass. Here, of course, petitioner was not requested to leave the store nor was she ever charged with a trespass; thus, this provision had no applicability here.*

Section 2046.5 does not require or enforce segregation. It is merely a neutral, colorless statute which provides that a restaurant owner may choose such customers as he pleases. In fact, this amounts to no more than a restatement of the ancient common law principle that a restaurant owner who does not offer lodgings to travelers may accept some customers and reject others, on personal or indeed any grounds, there being no duty to serve all customers. As the Court of Appeals held, it is clear that at common law a restaurant owner, unlike an innkeeper, was free to select patrons on any basis deemed satisfactory to him, 21 Halsbury's *Laws of England*, §941, p. 447 (3rd ed. 1957) (A. 209).

Respondent respectfully contends that Judge Waterman's dissent missed the essential point of the common law rule (A. 222-23). The innkeeper's duty arose from a desire to insure that the wayfarer would not be forced to spend the night unsheltered, at the mercy of the elements and other dangers. Thus, when a person held himself out as one who would aid travelers and offer them lodging, he could not then refuse those away from home the protection of his house, for

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* Petitioner's irrelevant reference to *Achtenberg* v. *Mississippi*, 393 F. 2d 468 (5th Cir. 1968), is simply a bootstrap attempt to raise issues that do not exist. That opinion reveals arrests for vagrancy, not trespass, which were totally unrelated to Kress. There was no proof and no finding that those arrests were related to Kress.

> ". . . if an innkeeper, or other victualler, *hangs out a sign and opens his house for travelers,* it is an implied engagement to entertain all persons who travel that way. . . ." 3 Blackstone, Commentaries, 164 (Lewis ed. 1902) at 166. (Emphasis added.)

Thus, a victualler, who does not furnish lodging, such as a restaurant owner (Tidswell, *The Innkeeper's Legal Guide,* p. 22 (1864)), is entirely distinct from an innkeeper, who by furnishing accommodations takes on a heavy duty. *Orchard* v. *Bush & Co.,* [1898] 2 Q. B. 284; *Thompson* v. *Lacy,* 3 B. & Ald. 283 (K. B. 1820). This proposition was well stated in *R.* v. *Rymer,* [1877] 2 Q. B. 136 at 139, 140, to which Judge Waterman referred, where the court held that:

> "The defendant was the proprietor of an hotel, and if the prosecutor had been refused accommodation in the hotel the case might have been different. But he was not. The place in question, known as the Carlton, was under the same roof as the hotel, but was entirely separate from it, with a separate entrance, and appears to have been a mere shop in which spirits are retailed across the counter. . . . Such a place is not an inn within the meaning of the common-law-rule. An inn is a place 'instituted for passengers and way-faring men:' *Calye's Case.* A tavern is not within the definition. In such a place as this no one has a right to insist on being served any more than in any other shop."

See, also, *Carpenter* v. *Taylor,* 1 Hilt. [N. Y.] 193, 195 (1856); *Ultzen* v. *Nicols,* [1894] 1 Q. B. 92; Beale, *Innkeepers and Hotels,* §35, p. 26 (1906).

There being no statutory provision to the contrary, the common law rule is in effect in Mississippi. *City of Jackson* v. *Wallace,* 189 Miss. 252, 196 So. 223, 225 (1940); *Western Union Telegraph Co.* v. *Goodman,* 166 Miss. 782,

146 So. 128 (1933). As the court stated in *State* v. *Brown*, 195 A. 2d 379, 382 (Del. 1963);

> "In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant . . . . has the right to select the clientele he will serve, and to make such selection based on color, race or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law."

To the same effect, see, *e. g.*, *Williams* v. *Howard Johnson's Inc.*, 323 F. 2d 102 (4th Cir. 1963); *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance* v. *Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773 (1944); *Davidson* v. *Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N. W. 967 (1918).

While Section 2046.5 provides that a restaurant owner may call upon proper law enforcement officials to enforce his decision not to accept certain customers, this too is nothing more than a restatement of the common law. Indeed, without this enforcement, the right to select customers is rendered meaningless. The storekeeper would either be at the mercy of the trespasser or forced to resort to his own physical strength or dangerous weapons to preserve his rights, which is exactly what trespass laws were designed to avoid. See 2 Pollack and Maitland, *The History of English Law*, 31, 41 (2d ed. 1909). To force the storekeeper to make such a choice is, in reality, to give him no alternative. The common law did not create a right without a remedy and Section 2046.5 does nothing more than confirm that basic principle. *Cf. Bell* v. *Maryland*, 378 U. S. 226, 328 (dissenting opinion) (1964); *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D. Md.), *aff'd*, 284 F. 2d 746 (4th Cir. 1960).

A statute such as Section 2046.5, which merely restates existing common law rights, is clearly insufficient state involvement to give respondent's action the color of state law. *Harrison* v. *Murphy*, 205 F. Supp. 449, 453 (D. Del. 1962); *State* v. *Brown, supra.* In order to prove that respondent acted under color of state law, petitioner must point to some positive provision of state law requiring or encouraging the segregation of public eating places. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959). In that case, which is strikingly similar to the instant situation, plaintiff, a Negro who had been excluded from defendant's restaurant, argued that while no state statute compelled segregation in restaurants, the acquiescence of the state in discriminatory customs of the people of Virginia supplied the necessary state action. The court flatly rejected this argument (p. 847) because it

> "fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of a state in accordance with their own desires and social practices. *Unless these actions are performed in obedience to some positive provision of state law* they do not furnish a basis for the pending complaint." [Emphasis supplied]

The necessity for such a positive provision of law was reiterated by the court in a second suit brought by Williams, *Williams* v. *Howard Johnson's, Inc.*, 323 F. 2d 102 (4th Cir. 1963), and reaffirmed by that court sitting *en banc* in *Williams* v. *Lewis*, 342 F. 2d 727 (4th Cir.), *cert. denied*, 382 U. S. 814 (1965). Without a positive provision of law, there can be nothing more than private discrimination; which, of course, is not actionable under Section 1983. *Elders* v. *Consolidated Freightways Corp., supra; cf., Jobson* v. *Henne*, 355 F. 2d 129 (2d Cir. 1966).

Not only is Section 2046.5 a neutral restatement of common law, but its very existence is in form only. The actions of the Mississippi legislature which gave birth to the statute occurred almost a decade before the incident which is the subject of the present case. Since its enactment the statute has withered into oblivion, never having been enforced by the state. If, as the dissent below urges, the simple existence of this statute can supply the missing state action, then any act by a citizen automatically becomes the act of the state, rendering him liable to Section 1983. Such a result is unconscionable and the Second Circuit properly concluded that "the state must do more than it has done for the required state action to be found" (A. 209).

Petitioner has argued that when the Circuit Court of Appeals decided that Section 2046.5 was insufficient to support state action, it narrowly construed this Court's ruling in *Reitman* v. *Mulkey,* 387 U. S. 369 (1967) (Petitioner's Brief, p. 26). However, rather than analyze the decision in *Reitman,* petitioner instead attempts to weave in allegations from her conspiracy argument, relating to the incident at the Hattiesburg Library and her arrest on charges of vagrancy (Petitioner's Brief, pp. 44-47), in an unwarranted effort to taint Kress with state action because of the independent and totally unrelated discriminatory acts of the Hattiesburg police.

The present case in no way falls within the ambit of state action set forth in *Reitman,* where this Court, referring extensively to the decision and reasoning of the California Supreme Court, held that Article I, §26 of the California Constitution significantly involved the state in racial discrimination in housing. As the Court of Appeals noted (A. 209), in *Reitman* the State of California, by a widely publicized statewide initiative and referendum, affirmatively acted to repeal its existing anti-discrimina-

tion housing laws, and embodied the right to discriminate in the state's constitution. This Court ruled that the California Supreme Court believed that the "potential impact" and "ultimate effect" of Article I, §26 would be to "significantly encourage and involve the State in private discriminations" 387 U. S. at 373, 380, 381. All this is quite different from the present case, where the only relevant Mississippi statute in question restates the common law, and, though on the books for more than a decade, has never been enforced or invoked. As the Court of Appeals stated, "[a]t least as applied to this case, we think the state must do more than it has done for the required state action to be found" (A. 209).

Both logic and precedent suggest that the mere existence of a statute such as Section 2046.5 cannot clothe private citizens with the authority of the state so as to render private decisions actionable under Section 1983. *Cf.*, *Elders* v. *Consolidated Freightways Corp.*, 289 F. Supp. 630 (D. Minn. 1968); *Stevens* v. *Frick*, 372 F. 2d 378 (2d Cir.), *cert. denied*, 387 U. S. 920 (1967).

To allow the existence of Section 2046.5, without more, to be the basis for state action here would be to make state action a nullity. This Court has refused to do such a thing in the past, and, we urge, should refuse to do so now. It is respectfully submitted that if this Court permits petitioner's theory to prevail, it will have positively and effectively removed the state action requirement from the Fourteenth Amendment. Such a result is, we believe, neither necessary nor warranted in this case.

B. Respondent's Refusal of Service Was Not Pursuant to Any "Custom or Usage" of the State

In a further attempt to establish state action, petitioner has contended that there was some custom and usage against the mixing of whites and Negroes in public places in Mississippi in the summer of 1964, and that it was this

custom which prompted respondent to refuse service to petitioner. Petitioner, however, has ignored the clear mandate of the statute that no matter what custom is proven (and none was established here) it must be *enforced* by the state before it may ground a cause of action.

Section 1983 does not concern itself with non-governmental customs. Just as there must be a significant involvement of the state to prove that a private person acted under color of law, so must the state be equally involved before action pursuant to an alleged private custom becomes state action. Petitioner must show that state power "has in fact been exercised." Cf. *New York Times* v. *Sullivan*, 376 U. S. 254, 265 (1964.)

Turning to the question of custom, petitioner claims its definition to be:

> "a usage or practice of the people which by common adoption and acquiescence, and by long unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject-matter to which it relates." Black's Law Dictionary, 461 (4th ed. 1951).

Contrary to petitioner's assertion, however, this was not the definition of custom which was Congress' intention in Section 1983. In drafting the Civil Rights Act of 1964, Congress originally looked to, and copied verbatim, the language of Section 1983. H. R. 7152, §201(d), 88th Cong. 2d Sess. (1964). However, Congress ultimately legislated that:

> "Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter [of the 1964 Act] if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance or regulation; or (2)

> is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof. . . ." 42 U. S. C. §2000 a(d).

This language in no way modifies the Section 1983 definition of state action. Rather, it merely clarifies what the word "custom," as used in Section 1983, actually means and has meant since 1866—custom "required or enforced" by the state. This was made clear by Rep. Celler of New York, one of the architects of the 1964 Act, in a statement supporting the amendment to the original bill which embodied the final "custom" language:

> "The phrase 'under color of any law, statute, ordinance, regulation, custom or usage' was apparently first used in the Civil Rights Act of 1866 and has appeared in subsequent civil rights legislation. In the civil rights cases the Supreme Court held the word 'custom' in the 1875 Civil Rights Act to mean custom having the force of law—109 U. S. at page 106. This interpretation would seem to be accurate, but since in its original context in the 1866 legislation, custom seems to have referred to official action taken as a matter of accepted practice without formal statutory authority. *Thus, custom or usage is not constituted merely by a practice in a neighborhood or by popular attitude in a particular community. It consists of a practice which, though not embodied in law, receives notice and sanction to the extent that it is enforced by the officialdom of the State or locality.*" 110 Cong. Rec. 1881 (1964). [Emphasis added.]

Representative Meader of Michigan was more succinct when he stated that "it is not some non-State or nongovernmental usage or custom being discussed in this passage of the bill." 110 Cong. Rec. 1880 (1964).

The courts have consistently agreed with this interpretation and have stated that

> "The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment." *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845, 848 (4th Cir. 1959).

Accord: *Williams* v. *Hot Shoppes, Inc.,* 293 F. 2d 835 (D. C. Cir. 1961), *cert. denied,* 370 U. S. 925 (1962); *Slack* v. *Atlantic White Tower System, Inc.,* 181 F. Supp. 124 (D. Md. 1960), *aff'd,* 284 F. 2d 746 (4th Cir. 1960).

In spite of these clear holdings, petitioner has claimed that Section 2046.5 is a sufficient source of state involvement in the relevant custom.* The fact that petitioner offered no other evidence to link the state to the custom explains Judge Bonsal's ruling that for petitioner to prevail, she had to prove that the custom, if one were established, was "enforced by the State of Mississippi pursuant to Section 2046.5" (A. 182).

As discussed at pages 33-38, *supra,* Section 2046.5 has never been enforced or invoked and has thus not involved the state in any way with Kress' action. Since without proof of this necessary element of the case the jury could not have rendered a verdict for petitioner, a directed verdict was appropriate. *Gordon* v. *Illinois Bell Telephone Co.,* 330 F. 2d 103 (7th Cir.), *cert. denied,* 379 U. S. 909 (1964).

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* The following colloquy sets forth petitioner's position:

"The Court: What evidence have you introduced that the state supported it?

"Mrs. Piel: The fact the statute is on the books, that is all" (A. 321).

* * * *

"The Court: So you are relying purely on the statute.

"Mrs. Piel: As to the state action part, yes.

"The Court: Without any evidence whatsoever that that statute has ever been used to enforce this discrimination of which you speak?

"Mrs. Piel: No, that's right" (A. 317).

Petitioner and the dissent below have belabored the question of determining the relevant custom. This is immaterial, however, because the trial court assumed, for purposes of respondent's motion for a directed verdict, that the relevant custom was as urged by petitioner. Irrespective of the relevant custom, whether it be the refusal of service to whites in the company of Negroes or the separation of the races in restaurants or places of public accommodation, the court concluded that petitioner did not proffer sufficient evidence of state involvement. It was, indeed, this absence of proof of the basic Fourteenth Amendment requirement that left Judge Tenney with no choice other than to direct a verdict for respondent (A. 322):

> "Even if I were to accept that very broad interpretation of custom and usage to cover any manifestation of the antipathy between the white and black races I just don't see how there would be anything to submit to the jury on the question of whether this was enforced by the state in this particular instance in the record of this case."
>
> • • •
>
> "[Y]ou may be right on the broad argument that what you are talking about as custom and usage is the custom and usage vis-a-vis the white and black races in Mississippi. But how are we to infer the defendant knew about it, or how are we to infer that it was enforced on the record before the Court? That is what I must deal with (A. 319)."
>
> • • •
>
> ". . . But strain as I will I can't find state action here.
>
> ". . . [R]egardless of what the feelings of the people of the community are, if you don't have enforcement by state action, or if it isn't such a

> custom and usage in the eyes of the law that it is almost on the same standing as law itself, and recognized by the state, then this is a private action which, rightly or wrongly, has been held not to be covered by the old Civil Rights Act.
>
> "So that is what I am faced with, it seems to me. And on that basis I will direct a verdict for the defendant (A. 322)."

It does not help petitioner to argue that there was a custom in Mississippi among the people generally of fostering the segregation of the races. Even if there were such a custom in the summer of 1964, it would have no bearing on Kress or upon this case, for Kress had only one set of eating facilities in its store, at which it served all customers (A. 282). There is not, and cannot be, any claim that Kress segregated the races in its Hattiesburg store.

Furthermore, the proof in the record establishes that Kress was not aware of and did not act pursuant to Section 2046.5 or any custom or usage, but rather for good cause to avoid serious violence at the moment. Kress served both Negroes and whites, whether they came in together or separately, both before and after August 14th and, indeed, on that very same day (A. 138). Kress had, and still has, a firm written policy prohibiting any discrimination in its stores based upon race, color or creed (A. 106). Because violence was averted on August 14th, the Hattiesburg store has remained open and has continued to serve all people, black and white together, without incident, at its facilities.

This case arose out of the most unusual circumstances, which never occurred before or after the day in question. Thus, it is clear that this case involves only one isolated incident, totally unrelated to any claimed custom, usage or statute of the state.

POINT IV

The District Court correctly excluded two surprise witnesses first designated at trial.

On December 9, 1965, pursuant to Rule 13 of the Calendar Rules of the United States District Court for the Southern District of New York, that court ordered the parties to exchange lists of witnesses and to file pre-trial memoranda setting forth a list of witnesses which each party intended to call along with the specialties of experts to be called (A. 119). Petitioner listed, in addition to herself, only the six students (A. 199).

The parties thereafter agreed to a pre-trial order which provided that the only witnesses at the trial would be those previously designated, and

> "[s]hould any party hereafter decide to call any additional witnesses, *prompt* notice . . . shall be given. . . . It shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum." [Emphasis the court's] (A. 195)

A similar requirement was set forth in the pre-trial order with respect to any expert witnesses (A. 195).

Despite the fact that a pre-trial conference was held before the trial judge two weeks prior to trial, at which time petitioner's counsel made no mention of new witnesses, on the day before trial, petitioner served a paper entitled "Amendment to Trial Memorandum" advising respondent, for the first time, of her intention to call an expert witness. In her trial memorandum, served the same day, petitioner mentioned, in passing, proposed testimony of a second witness whose name had never before appeared in the case. In neither instance did petitioner

"set forth the reason why the witness was not theretofore identified" as required by the District Court's order.

When respondent's counsel objected to the surprise calling of these witnesses, it became clear that despite the fact that the issues to be tried had been agreed to almost a year earlier, petitioner's counsel had made no effort to secure these witnesses until the week before the trial (A. 229-30). Even at that late date, counsel did not inform respondent of the fact of the additional witnesses, much less their names. The problem was further complicated by the fact that petitioner's counsel confessed that she had not met the proposed witnesses and did not really know what their testimony would be (A. 231, 233).

Petitioner's excuse here is identical with that offered in *Thompson* v. *Calmar S. S. Corp.*, 331 F. 2d 657, 662 (3d Cir.), *cert. denied*, 379 U. S. 913 (1964), where the court ruled that

> "the only excuse offered by the defendant is that it was uncertain that the witness would be available at the time of trial. In these circumstances it would be wholly contrary to the spirit of our Rules and destructive to orderly procedure to have permitted him to testify."

The effect of such a tactic in this case would have been to strip Kress' counsel of an opportunity to prepare for cross-examination of these witnesses, whom Kress' counsel had never even heard of before. Such a sporting theory of justice has been condemned as repugnant to our judicial system. *Clark* v. *Pennsylvania R. R. Co.*, 328 F. 2d 591, 594-595 (2d Cir.), *cert denied*, 377 U. S. 1006 (1964); *Hoeppner Construction Co.* v. *United States*, 287 F. 2d 108 (10th Cir. 1960); *Globe Cereal Mills* v. *Scrivener*, 240 F. 2d 330 (10th Cir. 1956).

The vacuity of petitioner's argument is demonstrated by the fact that her counsel advised the court that a postponement of the case would not help because "on the date the case could be put over I could well not have had" the witness (A. 233).

Further, petitioner admitted in her brief below that while the two excluded witnesses would have testified with respect to custom and usage in Mississippi in 1964, the exclusion of these witnesses was not "pivotal since evidence was adduced through plaintiff as to the custom and usage" in Hattiesburg. Obviously where, as here, the testimony of the witnesses would have been cumulative and of no probative value, it is within the sound discretion of the trial court as to whether it should be admitted. *Mahoney* v. *N. Y. Cent. R. R.*, 234 F. 2d 923 (2d Cir. 1956); *Jahn* v. *Pedrick*, 229 F. 2d 71 (2d Cir. 1956).

The facts here demonstrate, as the Circuit Court unanimously agreed, that not only was it a proper exercise of discretion to exclude the witnesses pursuant to Rule 16 of the Calendar Rules of the District Court, but, indeed, it would have been an abuse of discretion and prejudicial to respondent to do otherwise., *Cf.*, *Thompson* v. *Calmar S. S. Corp.*, *supra*; *Taggart* v. *Vermont Transportation Co.*, 32 F. R. D. 587 (E. D. Pa. 1963), *aff'd per curiam*, 325 F. 2d 1022 (3d Cir. 1964). Such a ruling will be set aside only where it is "manifestly erroneous." *Salem* v. *United States Lines Co.*, 370 U. S. 31 (1962).

CONCLUSION

For all of the foregoing reasons, the judgments and orders of the Courts below should be, in all respects, affirmed.

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Respectfully submitted,

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